

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAITH UNITED METHODIST CHURCH AND CEMETERY
OF TERRA ALTA, WEST VIRGINIA AND TRINITY
METHODIST CHURCH OF TERRA ALTA, WEST VIRGINIA,

PETITIONER,

VS.

DOCKET NO.: 12-0080
(CIVIL ACTION NO.: 11-C-27)

MARVIN D. MORGAN,

RESPONDENT.

PETITIONERS' BRIEF

A handwritten signature in cursive script that reads "Steven L. Shaffer".

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TABLE OF CONTENTS

Table of Authorities 3

Assignments of Error 4

Statement of the Case 5

Summary of Argument 11

Statement of Oral Argument 16

Argument 17

Conclusion 26

TABLE OF AUTHORITIES

W. Va. Code §36-1-11

UHL v. Ohio River R. Co., 41 S.E. 340, 51 W.Va. 106 (1902)

Williams v. South Penn Oil Co. et al., 43 S.E. 214, 52 W.Va. 181 (1903)

Dolan et al., v. Dolan et al., 73 S.E. 90, 70 W.Va. 76 (1911)

Ramage v. South Penn Oil Co., 118 S.E. 162, 94 W.Va. 81 (1923)

Drummond v. White Oak Fuel Co., 104 W.Va. 368, 140 S.E. 57, 58, (1927)

W. Virginia Dept. of Highways v. Farmer, 159 W.Va. 823, at 825, 226 S.E.2d 717, at 719 (1976)

Pocahontas Land Corp. v. Evans, 332 S.E.2d 604, at 609 (W.Va. 1985)

Zimmerer v. Romano, 679 S.E.2d 601, 223 W.Va. 769 (2009)

ASSIGNMENTS OF ERROR

- 1) The Circuit Court erred when it ruled that the 1907 deed of conveyance between Florence Forman and her brother, Walter Forman, was ambiguous and that the deed should be construed against Florence Forman, the grantor, and in favor of Walter Forman, the grantee.

STATEMENT OF THE CASE

Central to this case is a deed dated November 14, 1907, which conveys Florence Forman's 1/7th interest in the "surface only with the hereditaments and appurtenances thereto belonging" to Walter S. Forman.

Florence Forman and Walter Forman were two of the seven children of Calvin Forman. Calvin Forman died intestate, survived by Charles Forman, Olive B. Forman, Margaret S. Wolfe, Lillie M. Forman, Walter S. Forman, Ruth Cuppett, and Florence Forman. Under the laws of intestate succession, Calvin Forman vested each child with a 1/7th interest in the 225 acre tract of land, situate in Portland District, Preston County, West Virginia. (see record, p. 117). The said deed is attached to Plaintiff's Complaint and identified as Exhibit C. (see record, p. 49).

The Plaintiff, Marvin Morgan, filed his "Complaint for Declaratory Judgment, and Alternatively, Verified Petition for Sale or Lease of Mineral Interests Owned by Missing, Unknown, or Abandoning Owners" on February 7, 2011. (see record, p. 1).

Plaintiff claims that he is the vested 100% owner of the surface of the subject 225 acres through the Walter S. Forman chain of title and that he owns either at least 19/21 of the oil and gas mineral interests of the subject property or that he owns the entire mineral interest in the subject property through the Walter S. Forman chain of title. (see record, p. 7).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, filed their "Answer to Plaintiff's Complaint for Declaratory Relief" on March 23, 2011. (see record, p. 1).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, claim that they own an interest in and to the

minerals under the subject real estate through the chain of title of Elfie Mae Wolfe, which would have passed via intestate succession from Florence A. Forman. (see record, p. 16 & p.11).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, further claim that the deed, dated November 14, 1907, was clear on its face, unambiguous and conveyed only Florence Forman's 1/7th interest in the "surface only" in the subject real estate. (see record, p.69).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, further rely on the title examination prepared by Novus and included in Plaintiff's Complaint to prove that they own an interest in the oil and gas minerals in the subject real estate. (see record, p. 70). The said title examination is attached to Plaintiff's Complaint and identified as Exhibit A. (see record, p.41).

The Plaintiff and these Defendants have all executed oil and gas leases with Novus Exploration, LLC. (see record, p. 7 & p. 16).

The Circuit Court had a scheduling hearing on May 19, 2011, and at that hearing all parties agreed that there would be no discovery conducted in this matter as all issues presented were questions of law regarding the interpretation of instruments filed of record with the County Clerk of Preston County, West Virginia. The Plaintiff was to file a motion for summary judgment and the Defendants were to file responses to the motion for summary judgment. The Court was to hold a dispositive motion hearing on August 5, 2011. (see record, p.77).

Plaintiff filed his Motion for Summary Judgment and his memorandum in support thereof on July 1, 2011.(see record, p.88). Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, filed their

Answer to Plaintiff's Motion on July 29, 2011. (see record, p.105). Mary E. Georg filed an Answer, on behalf of her clients, to Plaintiff's Motion on August 1, 2011. (see record, p.117). Robert D. Plumby filed an Answer on behalf of his clients on August 2, 2011. (see record, p.120).

The Court held the dispositive motions hearing on August 5, 2011, and at that hearing, after reviewing plaintiff's Motion for Summary Judgment and certain defendants' responses, scheduled this matter for a Bench Trial on September 19, 2011. (see record, p.125).

The Court held a Bench Trial on September 19, 2011, wherein the following parties presented evidence in support of their Motion and Answers. (see record, p.197).

1. Plaintiff Marvin Morgan by counsel Seth Wilson and Josh Jarrell;
2. Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, by counsel Steven L. Shaffer;
3. Defendants Mary Virginia Moore Jones, Thomas S. Jones and Audra Jones Hansen, by counsel Mary E. George;
4. Defendant Lane Liston, Jr., pro se; and
5. Guardian ad Litem, Trudy H. Goff. (see record, p.184).

The Plaintiff presented testimony from Charles Morgan Haymond, a non-lawyer landman, and Terri Funk, Preston County Assessor.

Charles Morgan Haymond testified that he performed a title examination, even though he is not a licensed practicing attorney, for the subject tract of real estate and that the oil and gas underlying the subject tract had never been reserved. He further testified that neither Florence Forman, nor any of her heirs or assigns, ever conveyed, devised or mortgaged her 1/7th share of the

oil and gas. He also testified that neither Florence Forman, nor any of her heirs or assigns, ever entered a one seventh (1/7) interest in the oil and gas underlying the subject tract on the Preston County landbooks for tax assessment. (see record, p.201).

Mr. Haymond testified to the above despite his title examination report which clearly shows that several individuals had entered into gas leases on the subject tract and plaintiff's complaint clearly shows that Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, had entered into a gas lease with Novus. (see record, p. 16, 27-29).

Terri Funk testified regarding how her office handles the recordation of "surface," "fee" and "minerals." (see record, p.202). Ms. Funk further testified that her office sent a letter to Plaintiff, Marvin Morgan, informing him that the subject tract was erroneously assessed as "surface" and that the Assessor's Office revised his assessment to "Fee." (see record, p.203). A copy of that letter and office memorandum was entered as Plaintiff's Exhibit Number 4, at the hearing. (see record, p.140-142). That letter and memo states that the subject tract was assessed on the land books of Preston County as "Fee" until 1948 and then it changed to "sur." (see record, p.141).

Upon cross examination by Attorney Shaffer, and through exhibits entered by the Defendants, numbered 1-13, which are certified copies of the land books from the Preston County Clerk's Office, clearly shows that the subject tract was not continuously assessed as "Fee" prior to 1948, and was never assessed as "fee" from 1948 up through 2010. This proves the memorandum and letter from the assessor's office to Marvin Morgan was not correct and the examination performed by the assessor's office was flawed and erroneous. (see record, p. 143-166).

After the hearing on September 19, 2011, the Circuit Judge Ordered the parties to file Findings of Fact and Conclusions of Law by October 21, 2011. (see record, p.167).

Defendant Lane Liston, Jr., pro se, filed his Findings of Fact and Conclusions of Law on October 20, 2011. (see record, p.169).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, filed their Findings of Fact and Conclusions of Law on October 21, 2011. (see record, p.173).

Plaintiff Marvin Morgan filed his Findings of Fact and Conclusions of Law on October 20, 2011. (see record, p.184).

Defendants Mary Virginia Moore Jones, Thomas S. Jones and Audra Jones Hansen, by counsel Mary E. George, filed their Findings of Fact and Conclusions of Law on October 21, 2011. (see record, p.194).

The Court Entered its Order Regarding Ownership of Subject Tract Undivided 1/7 Oil and Gas Interest on November 9, 2011, and Ruled that the 1907 deed from Florence Forman to Walter Forman was ambiguous and should be construed against Florence Forman. The Court used the *Ramage* case, which was decided by this Court in 1923, to determine that the word "surface" does not have a definite definition and can be interpreted in various ways and therefore the deed was ambiguous. (see record, p.197-208).

The Court, on November 17, 2011, on its own Motion, scheduled a status conference to be held on December 16, 2011. (see record p. 209) At that status conference on December 16, 2011, the Court inquired of the parties if there were any outstanding issues. Plaintiff's counsel stated there were none other than he wished to preserve his Count 2 of the Complaint in case the November 9,

2011, Order was appealed and reversed. Defendant's counsel stated there were no other issues other than filing the appeal on the November 9, 2011, Order, which was resolved by the Court's Order from the status conference, dated December 22, 2011, in favor of the Defendant. (see record, p.216).

Defendants Faith United Methodist Church and Cemetery of Terra Alta, West Virginia, and Trinity Methodist Church of Terra Alta, West Virginia, appealed Judge Miller's ruling that the Forman deed was ambiguous and that Marvin Morgan was the owner of the 1/7th interest in the mineral underlying the subject real estate. (see record, p. 218).

SUMMARY OF ARGUMENT

This entire case revolves around the issue of the words “**surface**” and “**surface only**” and what those words mean in the context of a conveyance of an interest in real estate.

If a person checks the definition of the word “surface” in Webster’s Dictionary, you will read that it is the outermost or uppermost layer or area of something; the exterior or outside boundary of something; outward appearance.

The word “**surface**” had a specific meaning also when it was used in deeds of conveyance of real estate. For many years, when it came to the word “surface,” when specifically used as a subject of conveyance, it had a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purposes.” Syl pt. 1, *Williams v. South Penn Oil Co. et al*, 52 W.Va. 181, 43 S. E. 214, (1903).

The West Virginia Supreme Court also said in 1927 that when the word “surface” is used in a grant of land, it creates a severance of the land into two parts, and prima facie refers only to the soil which covers the minerals-the “vestimenta terra” a mere surface grant has sometimes been likened “to the upper story of a building, entitled to support from below, but covering none of the subjacent land.” In using the word “surface,” the layman in casual conversation, **as well as the judge** in a considered opinion, ordinarily refers merely to the superficial part of the land. *Drummond v. White Oak Fuel Co.*, 104 W.Va. 368, 140 S.E. 57, 58, (1927)

The above two cases are just referring to the word “surface.” In the present case, the grantor in the 1907 deed was Florence Forman, and the grantee was Walter Forman, Florence’s brother. They had inherited a 1/7th interest in a 225 acre tract which their father, Calvin Forman, owned before he passed away. Prior to 1893, Calvin Forman died, intestate, and left his farm to his seven

children, however, prior to 1902, five of those siblings sold their interest in the real estate to their brother, Walter Forman.

In 1902, Walter Forman and Florence Forman sold all of the coal upon and under the subject real estate. Then in 1907, Florence Forman conveyed “**her one-seventh undivided interest in the surface only**” in the subject real estate to her brother, Walter Forman. The central issue in this case is, did Florence Forman convey her 1/7 interest in the oil and gas under the subject real estate to her brother, Walter Forman?

The deed of conveyance between Florence Forman and Walter Forman was prepared in 1907, when the word “surface” had a definite and certain meaning. The preparer of that deed not only was clear when he stated that Florence was only conveying the surface of the subject real estate, but he went one step further and used the words “surface only” to ensure of Florence Forman’s intent.

The West Virginia Supreme Court stated that where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily will not resort to parol or extrinsic evidence. *Pocahontas Land Corp. v. Evans*, 332 S.E.2d 604, at 609 (W.Va. 1985)

That Court further stated that “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl pt. 4, *Zimmerer v. Romano*, 223 W.Va. 769, 679 S. E.2d 601, (2009).

The Court also stated “It has long been held that where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give to every word its usual

meaning.” *W. Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, at 825, 226 S.E.2d 717, at 719 (1976).

As the Court has stated in these cases, if the grantor’s intent is clearly expressed in definite and unambiguous language, the lower court is to give effect to such language and it is not subject to judicial interpretation. The Court also stated that the lower court had the duty to give every word its usual meaning.

If the Circuit Court of Preston County would have followed these three Supreme Court cases, it would have found the words “surface only” showed Florence Forman’s definite and unambiguous intent and the lower court should not have attempted to use its judicial interpretation on the deed. The lower court also had the duty to give the words “surface only” their usual meaning, which was expressed in *Williams v. South Penn* and clearly says that when the word “surface” is used in a deed, the minerals are not conveyed.

The West Virginia Supreme Court also stated in 1902 that “in the construction of deeds, as well as wills, the rule **nowadays** is that the intention of the grantor controls, and technical words of legal import must yield to plain intent, and the whole instrument, not merely and separately disjointed parts, is to be considered.” *UHL v. Ohio River R. Co.*, 41 S. E. 340, 51 W.Va. 106 (1902)

The *UHL* and the *Williams* cases were the governing law regarding the word “surface” when used as a conveyance of real estate and how a court was to interpret a deed in 1903, and even up through 1907, when the Forman Deed was prepared and recorded. Another key word in the *UHL* case is “**nowadays**.” That word is important because that was the law which was used in 1907, when the Forman Deed was prepared, not the law set forth in *Dolan* in 1911, nor the law set forth in *Ramage* in 1923. To hold the 1907 preparer of the Forman Deed to the standard of that person

trying to know what the law was in 1911, 1923, 2011, or 2012 is preposterous, ridiculous and impossible.

The Supreme Court revisited the word “surface” in 1911 in the *Dolan* case. In that case the Court had a Will interpretation before it and was quick to note that the *Williams* case was properly decided in that *Williams* was interpreting a deed. *Dolan et al., v. Dolan et al.*, 73 S.E. 90, at 92, 70 W.Va. 76 (1911).

So we see, if the 1911 West Virginia Supreme Court would have had the present case before it, it would have clearly ruled that the words “surface” and especially the words “surface only” when used in a Deed, clearly means that only the surface was conveyed and not the minerals.

The Court again revisited the word “surface” in 1923 in the *Ramage* case. In that case the Court ruled that Syllabus Point Number 1 of the *Williams* case was overruled.

The 1923 Court, in overruling *Williams* stated that “it is but fair to say that if the *Williams* Case was correctly decided, as Judge Brannon says in the *Dolan* Case, then it is a precedent for the decision in this case, binding upon us, unless we overrule it.” *Ramage v. South Penn Oil Co.*, 118 S. E. 162, at 169, 94 W.Va. 81 (1923). That goes to prove that the word “surface” as set forth in the *Williams* Case was the law in 1907, and that Florence Forman only conveyed the surface to her brother in the 1907 deed. The 1923 West Virginia Supreme Court, in *Ramage*, overruled Syllabus Point 1 of *Williams*. However, that Court did not state that the rule was retroactive and that- therefore-all deeds prepared prior to 1923, and that all title examinations prepared prior to 1923, were null and void because of the new law created in 1923, in *Ramage*.

At the time, in 1907, when the Forman Deed was prepared, the governing law in the State of West Virginia was that the word “surface” had a definite and certain meaning and that was 'the

portion of the land which is or may be used for agricultural purposes. Plain and simple, that was the law when it came to a conveyance of real estate. In 1911, the Court looked at the word “surface” in regards to a Will interpretation and the Court said that the word surface had a different meaning when used in a Will than it did in a deed. Then in 1923, the Court said that it was overruling the *Williams* case in regards to the word “surface.” This was some 21 years after *Williams* was decided and attorneys in the State of West Virginia prepared many deeds using the word “surface” and used it with the definition which the West Virginia Supreme Court used. The attorneys who were preparing deeds during this time period could not know that the same court, years later would change the meaning of a word. Those deeds were prepared using the law in effect at that time and those deeds exhibited the intent of the grantors who wanted to convey the surface of their property and not the surface and all mineral underneath.

Florence Forman was one of these grantors and the deed she had prepared was clear and unambiguous in 1907 and that 1907 deed is clear and unambiguous today, using the law which was law at that time. The Preston County Circuit Court should have ruled that the 1907 Forman Deed was unambiguous and that Florence Forman only conveyed the surface only of the 225 acre tract and that she was the owner of the oil and gas under the subject tract.

STATEMENT ON ORAL ARGUMENT

Petitioner believes that oral argument is necessary under WVRAP 18(A), and believes that argument should proceed pursuant to WVRAP 20. The issue of an interest in mineral rights is clearly a matter of fundamental public importance, especially in today's society with the Marcellus Shale gas boom in West Virginia. The issue of what the words "surface" and "surface only" mean affects all owners of any surface and mineral interest in the State of West Virginia. Therefore, this case should be scheduled for oral argument under Rule 20(a)(2).

Petitioner believes that the case qualifies for oral argument under Rule 20(a)(1) because this case has a central issue of whether *Ramage v. South Penn Oil Co.*, 118 S.E. 162, 94 W.Va. 81 (1923), which was decided by this Court in 1923, was effective as of the date of that ruling, or if that case was retroactive and required all deeds prepared prior to 1923 to comply with the new meaning of the word "surface," as defined in *Ramage*.

Petitioner believes that if this Court rules that *Ramage* was to be effective retroactive, then it would have required all attorneys who prepared deeds prior to 1923 to have knowledge of what a court was going to rule in the future. Deeds such as the 1907 Forman deed were prepared as to what the law and the word "surface" meant at the time the deed was prepared.

Petitioner further believes that the time allotted for oral argument under Rule 20 is sufficient.

ARGUMENT

- 1) The Circuit Court erred when it ruled that the 1907 deed of conveyance between Florence Forman and her brother, Walter Forman, was ambiguous and that the deed should be construed against Florence Forman, the grantor, and in favor of Walter Forman, the grantee.

The Circuit Court ruled that the deed of conveyance, between Florence A. Forman, the Grantor, and her brother, Walter S. Forman, the Grantee, was ambiguous and not clear on its face. (record, p. 216). This was an error of law and should be reversed by this Court.

The issue in this case is not whether Florence Forman reserved the oil and gas rights underlying the subject real estate, but whether or not the oil and gas rights were conveyed to Walter Forman in the 1907 Deed, known as the Forman Deed, where the conveyance was of the “surface only.” Marvin Morgan asserts that the Forman Deed conveyed the oil and gas to Walter Forman, and ultimately to Marvin Morgan himself. However, Florence Forman conveyed the “surface only” to Walter Forman and, therefore, no minerals, including the previously severed coal, were conveyed to Walter Forman by operation of the Forman Deed.

The undisputed facts in this case are as follows:

1. That prior to 1893, Calvin C. Forman owned a Fee Interest in and to the subject real estate situate in Portland District, Preston County, West Virginia.
2. That prior to 1893, Calvin C. Forman died intestate, survived by his seven children, namely Charles Forman, Olive B. Forman, Margaret S. Wolfe, Lillie M. Forman, Walter S. Forman, Ruth Cuppett, and Florence Forman.

3. That under the laws of intestate succession, Calvin Forman vested each child with a 1/7th interest in the 225 acre tract of land, situate in Portland District, Preston County, West Virginia. (see record, p. 117). The said deed is attached to Plaintiff's Complaint and identified as Exhibit C. (see record, p. 49).
4. That prior to 1902, Charles Forman, Olive B. Forman, Margaret S. Wolfe, Lillie M. Forman, and Ruth Cuppett conveyed their 5/7 interest in the subject real estate to their brother, Walter S. Forman.
5. That in 1902, Walter S. Forman (6/7 interest) and his sister, Florence A. Forman (1/7 interest), sold all of the coal upon and under the subject real estate. (record p. 57) (Exhibit E attached to Morgan's Complaint)
6. That the 1902 deed stated that Walter S. Forman and Florence A. Forman owned a Fee interest in the subject real estate. (record p. 59)
7. That in 1907, Florence Forman executed a deed, recorded in Deed Book 120 at page 119 at the Office of the Clerk of the County Commission of Preston County, West Virginia, and the said deed stated that Florence Forman was conveying "**her one-seventh undivided interest in the surface only**" in the subject real estate. (record p. 200)
8. That in April 2010, Christine Bolyard, employee of the Preston County Assessor's Office, sent an interoffice memo to Terri Funk, stating that the subject real estate was assessed as "fee" until 1948 and then it was changed in the Land Book to "sur." (record p. 141)
9. That in April 2010, the Preston County Assessor's Office sent a letter to Marvin Morgan informing him that the office was changing his assessment to show that he was the owner of the real estate in "fee" less coal. (record p.140) It should be noted that Marvin Morgan never

paid any taxes on the minerals underlying the subject real estate during the entire time he owned it from 1967 until 2010.

10. That verified and certified copies of the Land Books of Preston County clearly show that the subject real estate was assessed as “sur” for several years between 1902 and 1948 and that both the memo from Christine Bolyard and the letter from the assessor’s office contained erroneous, incorrect and incomplete information. (record p. 143-151)
11. That according to verified and certified copies of the Land Books of Preston County between 1948 and 2010 clearly shows that the subject real estate was listed continuously in the Land Books as “sur.” (record p. 151-166)
12. That defendant Faith United Methodist Church and Novus Exploration entered into a gas lease in 2010, for the defendant’s interest in said oil and gas and said oil and gas lease is recorded in the Office of the Clerk of the County Commission of Preston County, West Virginia. (record p. 16)
13. That defendant Trinity Methodist Church and Novus Exploration entered into a gas lease in 2010, for the defendant’s interest in said oil and gas and said oil and gas lease is recorded in the Office of the Clerk of the County Commission of Preston County, West Virginia. (record 16)
14. In the exhibits attached to plaintiff’s petition, plaintiff specifically admits the ownership of Florence Forman, at the time of her death, in the oil and gas under the subject real estate; (see Exhibit A attached to Plaintiff’s Complaint, Title Examination of Claire Walls, page 7), (record p. 33)

15. That plaintiff Marvin Morgan has owned the surface of the subject real estate since 1966, and during the entire time which he has been the owner of the subject real estate, the real estate has been assessed as “sur” and the said Marvin Morgan has never paid any taxes on the mineral rights to the subject real estate. (record p. 141-166)
16. Plaintiff Marvin Morgan signed a lease with Novus for his interest in the oil and gas on the subject real estate. (see Exhibit B attached to Plaintiff’s petition) (record p. 46.)

The West Virginia Supreme Court of Appeals stated “A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.” Syl pt. 4, *Zimmerer v. Romano*, 223 W.Va. 769, 679 S. E.2d 601, (2009).

In the present case, Florence Forman expressed her intent when she used the words “**surface only**” in her deed of conveyance. Using those words, she clearly stated what interest in the subject tract she was conveying to her brother, Walter Forman. The 1907 deed was unambiguous and the lower court should not have interpreted the meaning of the words.

The word “surface” when specifically used as a subject of conveyance has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purposes.” Syl pt. 1, *Williams v. South Penn Oil Co. et al*, 52 W.Va. 181, 43 S. E. 214, (1903).

When the word “surface” is used in a grant of land, it creates a severance of the land into two parts, and prima facie refers only to the soil which covers the minerals-the “*vestimenta terra*.” A mere surface grant has sometimes been likened “to the upper story of a building, entitled to support from below, but covering none of the subjacent land.” In using the word “surface,” the layman in casual

conversation, **as well as the judge** in a considered opinion, ordinarily refers merely to the superficial part of the land. *Drummond v. White Oak Fuel Co.*, 104 W.Va. 368, 140 S.E. 57, 58, (1927)

“It has long been held that where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give to every word its usual meaning.” *W. Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, at 825, 226 S.E.2d 717, at 719 (1976).

Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily will not resort to parol or extrinsic evidence. *Pocahontas Land Corp. v. Evans*, 332 S.E.2d 604, at 609 (W.Va. 1985)

In the present case, the definite and unambiguous language was used when the attorney used the words “surface only.” The lower court should not have resorted to extrinsic evidence to try to figure the intent of the Grantor when the grantor conveyed the property over 100 years ago.

In the Forman Deed, Florence Forman specifically conveyed to Walter Forman: “her one seventh interest in the **surface only**... (the coal and mining privileges having been previously sold)...” (emphasis added). Morgan argues that the coal severance parenthetical modifies the phrase “surface only.” However, to do so, would not give the phrase “surface only” its usual and plain meaning, which was in effect in 1907 pursuant to the *Williams* case. The usual and plain meaning of “surface only” is the superficial part of the land. *Id.* At 58. Therefore, Walter Forman received the surface only pursuant to the *Williams* case.

The 1907 deed wherein Florence Forman conveyed real estate to her brother, Walter Forman, was prepared according to what the law was at that time. In 1907, the word “surface” had a very definite meaning. The West Virginia Supreme Court has, over the years, reinvented the wheel. They

have had case after case come before it regarding what the word “surface” means. They have looked at it in regards to deeds and wills. They have also looked at the word “surface” where it came to a coal interest being conveyed and not the oil and gas. *Ramage v. South Penn Oil Co.*, 118 S. E. 162, 94 W.Va. 81 (1923).

The Circuit Court should have followed West Virginia Case-Law as follows: “It has long been held that where language in a deed is unambiguous there is no need for construction and it is the duty of the court to give to every word its usual meaning.” *W. Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, at 825, 226 S.E.2d 717, at 719 (1976). Had the Circuit Court followed the law set forth in this case, it would have given the words “**surface only**” their usual meaning, and found that Florence Forman only conveyed the surface of the 225 acres to her brother.

The West Virginia Supreme Court, in 1903, ruled on the *Williams v. South Penn Oil Co. Et al* case. The law set forth in that case was that “[t]he word “surface,” when specifically used as a subject of conveyance, has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purpose.” Syl. Pt. 1 of *Williams v. South Penn Oil Co. et al.*, 43 S.E. 214, 52 W.Va. 181 (1903).

In 1903, when the West Virginia Supreme Court was ruling on the *Williams* Case, it had at its disposal a case that it had just ruled on in 1902. That case was *UHL v. Ohio River R. Co. et al.* The Court had held in that case, in Syllabus Point Number 6, that “in the construction of deeds, as well as wills, the rule **nowadays** is that the intention of the grantor controls, and technical words of legal import must yield to plain intent, and the whole instrument, not merely and separately disjointed parts, is to be considered.” *UHL v. Ohio River R. Co.*, 41 S. E. 340, 51 W.Va. 106 (1902)

These West Virginia Supreme Court cases were the governing law regarding the word “surface” when used as a conveyance of real estate and how a court was to interpret a deed in 1903, and even up through 1907, when the Forman Deed was prepared and recorded. Another key word in the *UHL* case is “**nowadays.**” That word is important because that was the law which was used in 1907, when the Forman Deed was prepared, not the law set forth in *Dolan* in 1911, nor the law set forth in *Ramage* in 1923. To hold the 1907 preparer of the Forman Deed to the standard of that person trying to know what the law was in 1911, 1923, 2011, or 2012 is preposterous, ridiculous and impossible.

The West Virginia Supreme Court revisited the word “surface” in 1911 in the *Dolan* case. In that case the Court had a Will interpretation before it and was quick to note that the *Williams* case was properly decided in that *Williams* was interpreting a deed. *Dolan et al. v. Dolan et al.*, 73 S.E. 90, at 92, 70 W.Va. 76 (1911).

So we see, if the 1911 West Virginia Supreme Court would have had the present case before it, it would have clearly ruled that the words “surface” and especially the words “surface only” when used in a Deed, clearly means that only the surface was conveyed and not the minerals.

The West Virginia Supreme Court again revisited the word “surface” in 1923 in the *Ramage* case. In that case the Court ruled that Syllabus Point Number 1 of the *Williams* case was overruled. That syllabus point was the law which stated that the word “surface” had a definite and certain meaning. The 1923 Court, in overruling *Williams* stated that “it is but fair to say that if the *Williams* Case was correctly decided, as Judge Brannon says in the *Dolan* Case, then it is a precedent for the decision in this case, binding upon us, unless we overrule it.” *Ramage v. South Penn Oil Co.*, 118 S. E. 162, at 169, 94 W.Va. 81 (1923). That goes to prove that the word “surface” as set forth in

the *Williams* Case was the law in 1907, and that Florence Forman only conveyed the surface to her brother in the 1907 deed. The 1923 West Virginia Supreme Court, in *Ramage*, overruled Syllabus Point 1 of *Williams*. However, that Court did not state that the rule was retroactive and that all deeds prepared prior to 1923, and that all title examinations prepared prior to 1923, were null and void because of the new law created in 1923, in *Ramage*.

The *Ramage* case also only dealt with the word “surface” with a specific reservation of the oil and gas. In the present case, the Forman deed clearly used the words “surface only” in a specific conveyance. The distinction is critical. “Surface” may mean, as case law indicates, everything but the severed mineral, however, the words “surface only” is clear and definite, and cannot be enlarged to include anything other than the mere superficial part of the land.

In the Plaintiff’s Bench Brief on Interpretation of an Ambiguous Deed, plaintiff cited the *Pocahontas Land Corp. v. Evans*, 332 S.E.2d 604, at 609 (W.Va. 1985) case which stated “Where the intent of the parties is clearly expressed in definite and unambiguous language on the face of the deed itself, the court is required to give effect to such language and, ordinarily, will not resort to parol or extrinsic evidence.” The West Virginia Supreme Court further stated, “It has long been held that where language in a deed is unambiguous there is no need for construction and it is the **duty of the court** to give to every word its usual meaning.” *W. Virginia Dept. of Highways v. Farmer*, 159 W.Va. 823, 825, 226 S.E.2d 717, 719 (1976).

As stated earlier, the 1907 Forman Deed should be interpreted as to what the law was in 1907 in the *Williams* case and not what the law was in 1911, 1923, nor 2012. To interpret the Forman Deed, which was prepared in 1907, under 1911, 1923, or 2012, law would be like construing or interpreting a deed prepared prior to 1974, wherein a grantor did not use a straw party to convey real

estate to the grantor and another person as joint tenants with the rights of survivorship. The law changed in 1974 and 1978 regarding the use of straw parties but it was not made retroactive. That is the way the new law which *Ramage* created should be applied. It was not made retroactive and therefore the 1907 deed needs to be construed and interpreted under the law in effect in 1907, which was that the word “surface” only meant the surface and did not include any minerals.

The Circuit Court erred when it ruled that the 1907 deed of conveyance between Florence Forman and her brother, Walter Forman, was ambiguous and that the deed should be construed against Florence Forman, the grantor, and in favor of Walter Forman, the grantee. This ruling by the Circuit Court is a conclusion of law and should be reviewed de novo.

CONCLUSION

Central to this case is a deed dated November 14, 1907, which conveys Florence Forman's 1/7th interest in the "surface" only with the hereditaments and appurtenances thereto belonging to Walter S. Forman.

The issue before this Court is not whether Florence Forman reserved the oil and gas rights underlying the subject property, but whether or not the oil and gas rights were conveyed to Walter Forman under the Forman Deed where the conveyance was of the "surface only."

The preparer of the 1907 Forman Deed was not a psychic and could not see into the future what the law was going to be in the future. The only thing he could do was to prepare the Forman Deed as per what the law was in 1907. The preparer of that document used the law in effect in 1907 just as an attorney preparing a deed in 2012 would be required to prepare the deed as to what the law was in 2012. (i.e. use of a straw party)

In 1907, the law was very clear when it came to what a grantor had to say if that person wanted to convey the surface rights to the subject real estate.

The West Virginia Supreme Court, in 1903, ruled on the *Williams v. South Penn Oil Co. et al* case. The law set forth in that case was that "[t]he word "surface," when specifically used as a subject of conveyance, has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purpose." Syl. Pt. 1 of *Williams v. South Penn Oil Co. et al.*, 43 S.E. 214, 52 W.Va. 181 (1903).

In 1903, when the West Virginia Supreme Court was ruling on the *Williams* Case, it had at its disposal a case that it had just ruled on in 1902. That case was *UHL v. Ohio River R. Co. et al.* The Court had held in that case in Syllabus Point Number 6 that "in the construction of deeds, as well

as wills, the rule **nowadays** is that the intention of the grantor controls, and technical words of legal import must yield to plain intent, and the whole instrument, not merely and separately disjointed parts, is to be considered.” *UHL v. Ohio River R. Co.*, 41 S.E. 340, 51 W.Va. 106 (1902)

In the Forman Deed, Florence Forman specifically conveyed to Walter Forman: “her one seventh interest in the **surface only**... (the coal and mining privileges having been previously sold)... (emphasis added). Morgan argues that the coal severance parenthetical modifies the phrase “surface only.” However, to do so, would not give the phrase “surface only” its usual and plain meaning in effect in 1907. The usual and plain meaning of “surface only” is the superficial part of the land. *Id.* at 58. Therefore, Walter Forman received the surface only.

These West Virginia Supreme Court cases were the governing law regarding the word “surface” when used as a conveyance of real estate and how a court was to interpret a deed in 1903, and even up through 1907, when the Forman Deed was prepared and recorded. Another key word in the *UHL* case is “**nowadays**.” That word is important because that was the law which was used in 1907, when the Forman Deed was prepared, not the law set forth in *Dolan* in 1911, nor the law set forth in *Ramage* in 1923. To hold the preparer of the Forman Deed to the standard of that person trying to know what the law was in 1911, 1923, 2011, or 2012 is preposterous, ridiculous and impossible.

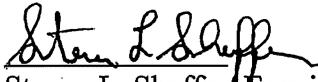
Although the West Virginia Supreme Court revisited the word “surface” in 1911 in the *Dolan* Case and in 1923 in the *Ramage* case, there are distinct differences between the present case and those two cases. In *Dolan*, the Court was interpreting a Will and was quick to note that the *Williams* case was properly decided in that *Williams* was interpreting a deed. In *Ramage*, the Court stated “it is but fair to say that if the *Williams* Case was correctly decided, as Judge Brannon says in the *Dolan* Case,

then it is a precedent for the decision in this case, binding upon us, unless we overrule it.” *Ramage v. South Penn Oil Co.*, 118 S.E. 162, at 169, 94 W.Va. 81 (1923). It should be further noted that in the *Ramage* case, the Court was only dealing with the word “surface” with a specific reservation of the oil and gas. In the present case, the Forman deed clearly used the words “surface only” in a specific conveyance. The distinction is critical. Under *Ramage*, “surface” may mean, everything but the severed minerals. However, the words “surface only” is clear and definite, and cannot be enlarged to include anything other than the mere superficial part of the land.

The word “surface” as set forth in the *Williams* Case was the law in 1907, and Florence Forman only conveyed the surface to her brother in the 1907 deed. The 1923 West Virginia Supreme Court, in *Ramage*, overruled Syllabus Point 1 of *Williams*. However, that Court did not state that the ruled was retroactive and that all deeds prepared prior to 1923 and that all title examinations prepared prior to 1923 were null and void because of the new law created by *Ramage* in 1923.

The 1907, deed between Florence Forman, the grantor, and Walter Forman, the grantee, was clear and unambiguous and clearly only conveyed the surface in the 225 acre tract. The importance of the present case cannot be overstated. If the law in *Ramage* is applied retroactive and is applied to all conveyances wherein the grantor used the word “surface” or “surface only” intending that only the surface be conveyed, it could change the entire real estate law as we know it and could affect every individual and business in the State of West Virginia. Every title examination which had been prepared on deeds of conveyance prior to 1923 could be affected.

The petitioner prays that this Court do the right thing and set the Circuit Court’s judgment aside and Order that the 1907 Forman Deed is unambiguous and that the heirs and assigns of Florence Forman are the owners of the 1/7 interest in and to the oil and gas underlying the 225 acre tract.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAITH UNITED METHODIST CHURCH AND CEMETERY
OF TERRA ALTA, WEST VIRGINIA AND TRINITY
METHODIST CHURCH OF TERRA ALTA, WEST VIRGINIA,

PETITIONER,

VS.

DOCKET NO.: 12-0080
(CIVIL ACTION NO.: 11-C-27)

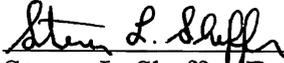
MARVIN D. MORGAN,

RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and actual copy of the hereto annexed "*Petitioner's Brief*" upon the respondent by mailing the same to counsel of record, by first class mail, postage prepaid, to the following address:

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